man who has unlawfully entered the United States three times. He has been arrested over and over. He has repeatedly demonstrated that he is a serious threat. Yet, despite these red flags, the system failed, and this man was free and able to commit these barbaric acts.

The extent of the systemic breakdown in this case is sickening. How criminal suspects unlawfully in the country are processed is a failure. The policies are terribly ineffective. In the current system, justice is delayed by bureaucracy or obstructed, in some cases, amazingly, by design. A broken system—some people prefer it that way and work to make it so. Others simply permit it to persist. Regardless, this has resulted in horrific crimes.

Sanctuary city policies and the laws that enable them must be fixed before the unnecessary loss of innocent life happens again. Failure to do so only allows more crimes like these murders and the spree of criminal behavior that preceded them.

Congress needs to act now. The President needs to act now. The Department of Homeland Security needs to act now. Local governments and law enforcement agencies need to act now.

The Senate's attempt to do just that has been stymied, but we must not give up on an effort to secure our Nation and protect Americans from harm. Failure to address these problems will only make the problems worse and will make them more difficult to solve later. Continuing the status quo means empowering career offenders, incentivizing law-evading behavior, impeding the prosecution of crime, and releasing dangerous and habitually unlawful individuals who have no place in our communities.

The victims of crime like last week's horrors in Kansas City have been failed by their communities and by their political leaders. Americans and our communities will continue to pay the price for the failure of our immigration system and the refusal of policymakers to work together to fix it.

Americans and their families will continue to pay—hopefully not again in the loss of life, but how can we guarantee that? We must act quickly. We must act now to correct these immediate problems, improve our Nation's broken immigration policies and laws, and stop the terrible consequences.

The loss of life is a terrible thing, and probably in this circumstance had no reason to happen, would not have happened if jobs had been done.

Kansans, Kansas families, Americans, American families deserve much, much better. These victims and their families—we honor them today, we offer our condolences and provide our sympathies—but these individuals and their families deserved better.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

NOMINATION OF JOHN KING

Mr. LANKFORD. Madam President, I rise to speak on the nomination of John King to be Secretary of Education.

Dr. King has impressive credentials and an inspiring personal story. I have had the opportunity to meet with him and discuss his leadership and his view of the law.

I shared with Dr. King that in the view of many legal experts and school officials across the country, the Department of Education has been bullying schools to comply with policies that simply do not have the force of law. This coercive use of power, however well intentioned, is wrong and it is unlawful.

Leadership requires making sure that those serving within the Department conduct themselves in full compliance with the law.

I have an obligation to the people of Oklahoma to ensure that the President's nominees adhere to the law. Regrettably, Dr. King has refused to commit to stopping these regulatory abuses if he were confirmed. For that reason, I will oppose his nomination today.

For far too long we have witnessed executive overreach in this administration. From the Clean Power Plan to waters of the United States, Federal departments and agencies have usurped the power to invent law with increasing boldness. The Department of Education overreach is similar in this kind.

Instead of promulgating rules that conflict with congressional intent, the Department of Education is skirting the rulemaking process altogether by issuing guidance documents they call Dear Colleague letters. Guidance documents cannot and do not have the force of law. Guidance documents may only interpret existing obligations found in statute or regulation.

Some agencies complain that the rulemaking process is too long and it requires too much public input, so it is easier just to say that the new rule simply interprets an existing rule, and then skip the compliance with the Administrative Procedures Act that is required for a new rule. It is complete irony that agencies see regulatory compliance as too burdensome, so they impose new regulatory guidance on States, local governments, tribes, and private institutions at a faster pace, and those institutions have no way to fight the rules—only comply.

Let me give an example from the Department of Education's Office of Civil Rights. They have a great responsibility to promote our shared American values of equal opportunity, ensuring gender equality, and to work with federally funded schools to prohibit sexual harassment and sexual violence. As the father of two daughters, I fully support the objectives of Title IX and condemn all forms of sexual discrimination.

But the Office of Civil Rights enforcement authority comes from Title IX of the Education Amendments of 1972 bill, and those Office of Civil Rights Dear Colleague letters that are now being put out there supposedly notify schools of their obligations under Title IX.

Two of the Office of Civil Rights Dear Colleagues letters significantly expand school liability by prescribing policies required neither by Title IX nor by OCR's regulations. I am particularly concerned with OCR's 2010 Dear Colleague letter on harassment and bullying and a 2011 letter on sexual violence.

These letters respectively prohibit conduct and require procedures not required by law. For example, the 2010 letter says that making sexual jokes or distributing sexually explicit pictures or creating emails or Web sites of a sexual nature can be actionable under Title IX. Well, regardless of what one personally thinks about abhorrent things like what I have just described, the First Amendment protects all forms of speech, and no part of our Federal Government can dictate what is said and not allowed to be said on a university campus. The 2010 letter leaves schools to wonder whether they should police certain speech on their campus or fear a Title IX investigation.

The 2011 letter requires schools to change their Title IX disciplinary procedures to require what is called a preponderance-of-the-evidence standard of proof. This means that the decisionmaker is 51 percent sure a student committed an act of sexual assault or sexual violence. But the Office of Civil Rights doesn't require many due process protections for the accused that he or she would enjoy being provided in a court of law.

The Office of Civil Rights said it was merely interpreting the ''equitable resolution'' standard that is in the law. So it changed, creating a new standard and saying it is just interpreting some equitable standard that is in the law—a standard that no other administration has ever applied.

If these policies had been subjected to notice-and-comment rulemaking, I wouldn't be standing here today. When agencies follow the law, notice and comment allows for public input and leads to better regulatory outcomes.

But universities never got that chance. So on January 7, 2016, I asked the Department of Education a simple question: From where in the text do you derive this new authority? Where is it in the law that you created this new policy? Because the Department of Education can't create a new law; they can simply promulgate rules from existing law. That is a pretty basic question: Where did it come from in the law?

Unfortunately, the Department of Education did not answer my question. They sent me a letter back, but in their response they insisted that they have the authority to issue guidance under Title IX and cited general abilities in the statute. They also cited prior guidance documents, which are also not legal documents. You can't

make a new guidance off of old guidance documents.

So on March 24, 2016, I replied back to them, pointing out that the 2010 and 2011 letters did, in fact, create new policy. In my reply, I also expressed concern over the reliance by the Office of Civil Rights on letters of findings to support their policy requiring the preponderance-of-the-evidence standard. But these letters are not binding on other schools, either. In fact, they show that the Office for Civil Rights looks to and has enforced these policies enumerated only in ''Dear Colleague'' letters across the country.

Legal scholars at Harvard Law and Penn Law have argued that the Office for Civil Rights' sexual harassment policy was ''inconsistent with the most basic principles we teach.'' Title IX was not written and has never been said to imperil these ''basic principles,'' as the professors pointed out, which include free speech, due process, and adherence to good administrative procedures. To me, this is evidence that the ''Dear Colleague'' letters changed the application of title IX and its regulatory landscape in fundamental ways. These policy changes should be subject to rulemaking process, not just inventing new guidelines.

Other prominent voices have also stated their concerns with the substance of and the manner in which the guidance documents were issued. Take, for example, the director of the civil liberties-minded Foundation for Individual Rights and Education, known as FIRE, who stated that ''OCR has consistently avoided giving real answers to questions about its power to issue regulations outside the bounds of the law. It cannot avoid accountability forever.''

An analysis from Inside Higher Ed, a respected news outlet for the postsecondary education community, stated:

> Last week, the Department clarified in a letter . . . that the Dear Colleague letter acts only as a guidance for college and does not ''carry the force of law.'' But many college presidents and lawyers argue that the Department's Office for Civil Rights treats the guidance far more than as a series of recommendations. Instead, they say, OCR uses the letter to determine which colleges are in violation of Title IX and to threaten the federal funding of those that don't follow every suggestion. Some Department officials have recently said there are clear ''musts'' and clear ''shoulds'' in the guidance, though colleges say the Office for Civil Rights does not seem to clearly differentiate between the two. Attempts to clarify which parts of the letter should be read as hard regulations and which should be considered recommendations have only led to more confusion and frustration.

That from this well-respected entity.

The publication also quotes Terry Hartle of the American Council on Education saying that ''the department's political leadership can say or write whatever they want, but where the rubber meets the road is where the Office for Civil Rights shows up to investigate cases on campus, and in those cases they consistently treat every single word of the guidance as an absolute mandate.''

Kent Talbert, a lawyer who served as general counsel at the Department of Education from 2006 until 2009, went on the record to say that the response to my letter that I got back from Dr. King and from the Department of Education ''glosses over'' concerns regarding whether the Department circumvented notice-and-comment rulemaking.

Hans Bader, another former attorney in the Office for Civil Rights, characterized OCR's response as a ''question-begging rationalization'' that did not ''address the criticisms . . . made by many lawyers and law professors.'' Mr. Bader went on to say that ''the 2011 Dear Colleague letter that was the subject of Senator LANKFORD's questions is just the tip of the iceberg when it comes to the Education Department imposing new legal rules out of thin air, without codifying them in the Code of Federal Regulations, or complying with the notice-and-comment requirements of the Administrative Procedure Act.''

Commentator George Will penned an op-ed on the same issue as my letter, and he said that when the Department argues ''its 'guidance' letters do not have the force of law—it's a distinction without a difference.''

Last week in my conversations with Dr. King about the Department of Education's practice of issuing guidance in lieu of rulemaking as required by law, he stated that if a school has a problem, they can challenge the Department in court, basically saying: If the schools have a problem with our guidance, they can sue us.

Were the Office for Civil Rights to take adverse action against a school for failure to comply with the guidance documents and if that school fought back in court, I believe that school would prevail. In fact, the legislative and policy director for FIRE said that institutions ''would be on very solid ground in challenging OCR because OCR's statements and policies clearly skirted the notice-and-comment requirements.'' But you tell me what school would have an incentive to accept the existential threat that litigation poses to their university when they file suit against the Office for Civil Rights? They risk reputational harm, legal penalties, and recision of Federal funding, all because the OCR thinks no one would actually sue them. Many schools decide the risk is not worth the reward, and the Department of Education knows it.

While individual companies or entire industries can and often do fight back against regulatory overreach from the Department of Labor or EPA, the Department of Education is in a position to hold Federal funding ransom if universities don't comply with its policies even when those policies are unlawful abuses of regulatory power. This is unacceptable.

Just because we share an objective of equality and school safety doesn't mean we can turn a blind eye to a Federal department running roughshod over the very regulatory process we require. Here the ends certainly do not justify the means, and schools and the very students we want to protect suffer as a result.

I do want to stress that I admire Dr. King's dedication to bettering our Nation's schools. All Americans are undoubtedly enriched by contributions made by such conscientious and exceptional educators. I thank him for his previous time of service, which is an impressive record.

Likewise, I appreciate that these guidance documents predate Dr. King's service at the Department and that he had no role in overseeing their development or issuance, but when asked to reexamine them and the process of how they were created, he protected them instead of acknowledging the problem with the process. That tells me there are more ''Dear Colleague'' letters coming to our schools, and this agency will continue to make up the rules in a vacuum and threaten Federal funding for those who dare not comply.

As part of my continuing discussions with the Office for Civil Rights, the Department has assured me they will take steps to clarify the interpretive role of guidance, increase transparency, and enhance opportunity for public input. I am encouraged that the Office for Civil Rights has committed to these improvements, and I look forward to a continued discussion on how better guidance practices, both in the Office for Civil Rights and across the entire government, can actually occur. Unfortunately, these proposals don't answer the questions I have asked Dr. King, nor do they in any way address the fundamental problems with the 2010 or 2011 ''Dear Colleague'' letters or the Office for Civil Rights' broader practice of issuing guidance in lieu of rulemaking. Because I have not received a full answer to the questions I asked the Department and because Dr. King does not acknowledge that this overreach is even occurring within the agency he is nominated to lead, I have no choice but to oppose his nomination today.

Time will tell whether this Department of Education is about to take a new direction with new leadership or whether they will continue the same path of coercive overreach they have already been on. This needs to stop. The American people require a voice in the rulemaking process, and I hope this can press on today.

With that, I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.